STATE OF MICHIGAN

COURT OF APPEALS

SUSAN I. CAREY,

Plaintiff-Appellant,

v

ADMIRAL PETROLEUM,

Defendant-Appellee.

UNPUBLISHED
February 15, 2005

No. 248449
Kalamazoo Circuit Court
LC No. 02-000417-NO

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right an order of the circuit court granting defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff was injured when she fell while walking to pay for gas she had just pumped at defendant's gas station. The circuit court concluded that the danger posed by the snow and ice on the ground in the area where defendant fell was open and obvious. We affirm. This case is being decided without oral argument under MCR 7.214(E).

"This Court reviews de novo decisions on motions for summary disposition." *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). "When reviewing a motion for summary disposition based on MCR 2.116(C)(10), [this Court's] . . . task is to determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Morales v Auto Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). This Court "'consider[s] the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant[s] the benefit of any reasonable doubt to the opposing party.'" *Id*., quoting *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Plaintiff contends that under *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), the open and obvious doctrine does not apply. We disagree. In *Quinlivan*, our Supreme Court "reject[ed] the prominently cited notion that ice and snow hazards are open and obvious to all and therefore may not give rise to liability." *Id* at 261. However, in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 333 n 13; 683 NW2d 573 (2004), our Supreme Court explained that *Quinlivan* "must be understood in light of this Court's subsequent decisions in *Bertrand* [*v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995)] and *Lugo* [*v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001)]."

> Thus, in the context of an accumulation of snow and ice, *Lugo* means that, when such an accumulation is "open and obvious," a premises possessor must "take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff]" only if there is some "special aspect" that makes such accumulation "unreasonably dangerous." [*Mann, supra* at 332, quoting *Lugo, supra* at 517 and M Civ JI 1905 (alteration by *Mann* Court). Accord *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004).]

Alternatively, plaintiff argues that the snow and ice that plaintiff fell on was not open and obvious. Again, we disagree. "The test to determine whether a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce, supra* at 238, quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993).

While plaintiff, who has lived in Michigan her entire life, did not indicate that she had seen and appreciated the danger posed by the condition of the ground in and around her car, she did indicate that she knew it had snowed recently and that her son had cleaned her vehicle off before she and her husband left their house. Plaintiff testified during her deposition that while her husband was standing next to her while she was lying on the ground, he was able to see that there was ice and snow in the area. We conclude that given these circumstances, the danger present in and around the gas pumps was open and obvious because an average person of ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection of the area. See *Joyce, supra* at 231.

We also reject plaintiff's assertion that the open and obvious doctrine does not apply because the danger was effectively unavoidable. *Lugo, supra* at 517; *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 4; 649 NW2d 392 (2002). While there was apparently only one door for customers to enter the main building of the gas station, there is no indication that the only route to the door was the one plaintiff had taken. Indeed, plaintiff acknowledged in her deposition testimony that she used what she thought was the "shorter" route. Plaintiff also testified that she did not know if a route around the front of her car would have been safer. Further, plaintiff's assertion on appeal that the area around the pumps and her car was covered with ice and snow is not supported by evidence in the lower court record. In fact, plaintiff's deposition testimony establishes that she had not observed how much ice and snow was in the area. She testified that as she was pumping the gas, she did not pay any attention to the condition of the ground, nor did she look around after her fall. Thus, the evidence does not establish that the danger was effectively unavoidable.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen